No. 42

In the Supreme Court of the United States

OCTOBER TERM, 1941

UNITED STATES OF AMERICA, PETITIONER

v.

LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AND AS LIQUIDATOR OF THE DOMESTICATED UNITED STATES BRANCH OF THE FIRST RUSSIAN INSURANCE COMPANY, ESTABLISHED IN 1827; VICTOR YERMALOFF, AND OTHERS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY

REPLY BRIEF FOR THE UNITED STATES

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THE COURTS BELOW DID NOT DETERMINE THAT THE SOVIET DECREES WERE NOT INTENDED TO COVER THE ASSETS IN NEW YORK

Respondent's brief (pp. 14–21) and that filed on behalf of the surviving directors of the Insurance Company, as *amici curiae* (pp. 7–12), stress a presumed determination by the New York courts, on the basis of the record in *Moscow Fire Ins. Co.* v. *Bank of New York*, 280 N. Y. 286,

that the Soviet decrees were not intended to apply to the assets of the First Russian Insurance Company in New York. We have shown in Point III of our main brief (pp. 78–84) that this contention is wholly untenable. In view of respondent's insistence on the point, we shall amplify the argument in this reply brief.

Respondent's motion to dismiss the complaint and for summary judgment (R. 10–11) was founded on Section 476 of the Civil Practice Act of New York, providing for judgment on the pleadings, and Rule 113 of the Rules of Civil Practice, providing for summary judgment. In this Court, respondent has abandoned any claim that the courts of New York could, or did, determine the scope of the Soviet decrees under Section 476 (Br. for Respondent, pp. 4–5, 14–15). Reliance is placed solely upon Rule 113.

The argument as to summary judgment is that the affidavit on behalf of the United States asserted no facts in support of the complaint, nor did it deny any of the allegations of the answer or of the moving affidavit. It is claimed, therefore, that under Rule 113 all of the allegations in the answer, including those concerning the scope of the Soviet decrees, were necessarily admitted, or that, at best, no issue was raised by the United States as to these allegations, and it was conceded that this case was wholly governed in all its aspects by the *Moscow* decision. This argument is

wholly unsupported by the New York decisions and by the record in this case. No issue of fact was raised by respondent or decided by the courts below.

1. Rule 113 permits a motion for summary judgment to be entertained and summary judgment to be awarded even though only issues of law are raised by the moving party. *Rotenbach* v. *Young*, 119 Misc. 267, 268 (Sup. Ct.), affirmed on opinion below, 206 App. Div. 775 (2d Dept.); *Coutts* v. *Kraft & Bros. Co.*, 119 Misc. 260, 261 (Sup. Ct.), affirmed 206 App. Div. 625 (2d Dept.); *Nostane Products Corp.* v. *Chas. L. Huisking*, 262 App. Div. 754 (2d Dept.). In such a case, and when only the legal sufficiency of a complaint or answer is attacked by the moving party, the defending party is not required to support the factual allegations of his pleading by affidavit or other proof. *Hessian Hills Country Club* v. *Home Ins. Co.*, 262 N. Y. 189, 195–196; *Goess* v. *A. D. H. Holding Corp.*, 85 F. (2d) 72, 75 (C. C. A., 2d) (applying the New York rule). "Upon a motion for summary judgment [by the plaintiff] a defendant is under no burden to show that affirmative allegations in the defense are not sham when the attack on such allegations is made solely on the ground that they are insufficient in law." *Hessian Hills Country Club* v. *Home Ins. Co.*, *supra*.

It is clear, as we point out in our main brief (pp. 80–81) that respondent's moving affidavit itself raised no issue of fact, and disclaimed such issue raised by its answer. It merely attacked the sufficiency of the complaint. It also stated that (R. 16): "Your deponent verily believes that there is no merit *as a matter of law* to the action set forth in the complaint herein." [Italics added.] The references to the *Moscow* case all concern its holding on matters of law, e. g. (R. 14): "Whatever may have been the law when the complaint herein was served and issue joined by the defendant's answer, it is now authoritatively settled * * * that the right to assets belonging to the United States Branch of a Russian insurance company is not dependent upon the 'law of Russia as formulated in the Soviet decrees,' and that no decree 'could possibly have been intended to apply to business conducted here, or if so intended could be binding here'."

Being thus under no duty to support the allegations of fact in its complaint, the United States contented itself with filing an answering affidavit stating that the *Moscow* case, the "decision in which case the Superintendent of Insurance alleges as his authority for the dismissal of the complaint herein" (R. 51, *cf.* R. 50), was about to be heard by this Court. It is nowhere even stated that the petitioner agreed with the Superintendent

that the decision of the Court of Appeals in the *Moscow* case was authority as to any issue in the instant case. It follows that the answering affidavit cannot be construed as a concession or admission, and the failure to offer proof in support of the factual allegations of the complaint is immaterial. Moreover, the United States has never conceded, in the courts below or here, that any issues of fact are involved in the present proceeding, or that the *Moscow* decision governs the question of the scope of the Soviet decrees.

2. In any case, as we have shown (main br. pp. 82–84), the mass of testimony in the *Moscow* case on the scope of the Soviet decrees is not such non-testimonial "documentary evidence or official record" as will ground a motion for summary judgment under the fifth paragraph of Rule 113.[1] In *Lederer* v. *Wise Shoe Co.*, 276 N. Y. 459, 464, the Court of Appeals said, in explaining why the paragraph in question applied to all actions and was not limited to those mentioned in the first eight subdivisions of the rule:

> Where proof is dependent upon *affidavits* made by persons not subject to cross-

[1] Respondent's brief refuses to consider what provision of the rule is applicable (p. 19), and he relies on very general statements as to the purpose of the rule (p. 16), but it is clear that the fifth paragraph is the only relevant provision (main br. p. 82). This the brief on behalf of the surviving directors seems to admit (pp. 8–9).

> examination, sound reason may be found for limiting summary judgment to classes of actions deemed appropriate. It is difficult to find any reason for imposing such a limitation where a legal defense is established by *documentary evidence or official record* and there is no issue about the verity or conclusiveness of the proof.

Respondent's view leads to the inadmissible conclusion that an affidavit on record in any case could be used as "documentary evidence or official record" to support summary judgment in other proceedings.

3. Even if the testimony on the meaning of the decrees contained in the *Moscow* record, were properly the basis for a motion for summary judgment, and had the United States failed to present opposing proof, it is improbable that summary judgment would have been granted. As we show below, respondent could not rest on the bar of *res judicata*, and he did not attempt to do so. That being so, the evidence and findings in the *Moscow* record would have to be so convincing that, without more, the court would say that only one conclusion as to the scope of the decrees could be reached. Cf. *Gen. Investment Co. v. Interborough R. T. Co.*, 235 N. Y. 133, 139, 142–143; *Curry v. Mackenzie*, 239 N. Y. 267, 269–270. If the trier of facts could properly reach one result

or another, the motion must be denied. It seems clear that a trial judge could properly conclude that the decrees were intended to reach the New York assets. See Rippey, J., dissenting in *Moscow Fire Ins. Co.* v. *Bank of New York*, 280 N. Y. 286, at 324. The decision of the Court of Appeals in the *Moscow* case does not foreclose such a holding, since the court there merely confirmed the Master's findings as supported by evidence (280 N. Y., at 306). There is nothing to show that a contrary finding would not have been equally supportable.

4. The opposing briefs hint, somewhat vaguely, that the *Moscow* case is *res judicata* on all points. But since respondent was not a party to the *Moscow* suit, he can not plead the defense of former adjudication. *Elder* v. *New York & Penn Motor Express, Inc.*, 284 N. Y. 350 (1940); *Goodman* v. *Kirshberg*, 261 App. Div. 257 (1st Dept., 1941); *Daly* v. *Terpening*, 261 App. Div. 423 (4th Dept., 1941); *Kessler* v. *Fligel*, 240 App. Div. 232 (1st Dept.) affirmed without opinion 266 N. Y. 508; *Kearns Coal Corp.* v. *United States Fidelity & Guaranty Co.*, 118 F. (2d) 33, 37 (C. C. A., 2d) (stating New York law). These cases hold that it is immaterial that the party against whom the bar of *res judicata* is sought to be raised was a party to a prior suit and there litigated issues

presently involved. He has the right to litigate anew.

Respectfully submitted.

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